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April 24, 2008

Donald S. Clark
Secretary
Federal Trade Commission
Office of Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: *In the Matter of Negotiated Data Solutions LLC, File No. 051 0094*
("N-Data")

Dear Mr. Clark:

The Alliance for Telecommunications Industry Solutions ("ATIS") submits this letter in response to the Federal Trade Commission's ("FTC" or "Commission") request for public comment on the Decision and Consent Order Agreement in *In the Matter of Negotiated Data Solutions LLC, File No. 051 0094* (the "*N-Data Decision*").

ATIS recognizes and appreciates the FTC's role in connection with addressing, in appropriate circumstances, standards-related conduct that may result in unfair and anticompetitive effects. Such a role is important for maintaining efficient and effective standards development, which is at the core of ATIS' purpose. In particular, ATIS is concerned with conduct that misleads, deceives or disadvantages those firms that participate in ATIS-sponsored standards development activities, and that distracts from ATIS' goal of developing implementable solutions to technical issues. ATIS' record has proven it to be very successful in achieving this goal, and it believes appropriate steps should be taken against those that engage in conduct that has the effect of undermining the careful balance of interests that has allowed ATIS to succeed. Such conduct would be an abuse or manipulation of the policies and practices that are aimed at promoting the effective development of ATIS standards, could deter technological innovators from contributing proprietary technology to ATIS' standards development efforts, and could frustrate the efficient and cost-effective implementation of ATIS standards based on the availability of reasonable and non-discriminatory license terms from owners of patented technology that is included in a standard.

Thus, to reiterate, ATIS appreciates the need for the FTC, or private parties, to take steps in appropriate circumstances to address egregious anticompetitive conduct that might arise under any of the aforementioned types of conduct. The FTC should employ its Section 5 powers judiciously, of course. Those powers may prove particularly appropriate in challenging the questionable conduct of parties that enforce acquired patents in a way that hurts competition.

ATIS is concerned, however, that the *N-Data* Decision may be given an overly broad reading, which may cause participants in standards development activities and SDOs such as ATIS to face potential increased risks that legal claims will be asserted, and require defense, based upon uncertain and unbounded standards for liability. This may cause firms to be less willing to participate in standards development activities out of risk of being the target of such claims or, equally significantly because the standards development process is caused to be inefficient and unresponsive to industry's need for technical solutions in a timely manner.¹ As a result, ATIS respectfully requests that the FTC clarify the scope and reach of the *N-Data* Decision to confirm that the decision is limited to the specific facts involved, and is not intended to state a general rule applicable in all circumstances involving *ex ante* licensing assurances during standards development. This would ensure that the Decision is not applied without boundary to challenge what might be entirely legitimate and important contributions and other conduct involved in the standards process. Such a clarification, ATIS believes, would also confirm the FTC's important role in identifying and addressing the specific conduct that actually does result in demonstrable, anticompetitive effects.

ATIS is a U.S.-based, not-for-profit organization committed to developing and promoting technical and operations standards for the communications and related information technologies industry worldwide. Accredited by the American National Standards Institute ("ANSI"), ATIS develops and promotes technical standards and solutions through the participation of more than 350 communications companies, including both technology owners and implementers. Like most traditional SDOs, ATIS has implemented an intellectual property rights ("IPR") policy to balance the interests of technology owners and implementers during standards development, and to ensure the integrity, efficiency and procompetitive nature of the standards development process.

ATIS' IPR policy, modeled on the ANSI IPR policy, encourages the early disclosure of patents that may be essential during the standard development process. If such a patent is disclosed, under ATIS' policy, ATIS shall receive an assurance of a willingness to license, for example, on reasonable and non-discriminatory terms, with or without compensation, or an assurance that the identified patent is not essential or will not be enforced in connection with the standard under development. ATIS' IPR policy does not currently specify when disclosure of a patent should be made or when an assurance should be received by ATIS in the event disclosure is made, nor does it require the disclosure of specific licensing terms. The ATIS policy, however, does not and never has prohibited the disclosure of specific licensing terms,

¹ ATIS' comments are limited to the issue of how the *N-Data* Decision may be misinterpreted and misapplied to limit effective standards development.

but it is provided that any negotiation of specific terms must take place outside of ATIS. This flexibility is an important feature of the ATIS IPR policy for a number of reasons.

First, standards development is a dynamic process. It may be that a proposed technical contribution for inclusion in a standard, upon which a patent may read, is significantly modified during the standards development process, or even rejected. This may make it difficult for a patent owner to provide a meaningful disclosure early in the process. It may also make it difficult for a patent owner to provide a meaningful licensing assurance at a particular point in the standards process. Yet, from ATIS' perspective, such disclosure and such assurances early in the process should be encouraged so that potential implementers of standards will have greater knowledge of important information as early in the process as possible. Accordingly, if a rule were adopted, or the *N-Data* Decision was interpreted, to prohibit a patent owner from modifying its licensing assurance as circumstances evolve, patent owners might be less likely to make early disclosures and provide early licensing assurances.

Second, the development of open standards in SDOs such as ATIS requires a balancing of all stakeholder interests. This includes the interests of owners of technology, users of technology and consumers. For this reason, ATIS' IPR policy expressly provides that there is no objection to the inclusion of patented technology in a standard. Indeed, a patented technology may reflect the preferred or optimal technical solution for addressing the matter being standardized. Thus, the ATIS policy seeks to ensure that, if patented technology is included in a standard, implementers are able to use the technology once they negotiate a license with the patent owner. The policy also seeks to encourage the contribution of patented technology for consideration for inclusion in standards. If patent owners were subject to uncertain rules and potential liabilities they might be less likely to make such contributions.

Third, it must be recognized that the varied interests involved in standards development activities often can result because different firms have different business strategies and approaches, including in connection with the use of intellectual property rights. ATIS does not define what those strategies or approaches should be, but it does seek to provide a forum that is accommodating to all. This is one reason that ATIS seeks the clarification requested in these comments. Simply, a broad and, as the Commission states, "elusive" unfairness standard could be misused by firms, or even if used in good faith could increase the disputes among standards participants because one firm's concept of fairness might differ from another's. Such disputes will hurt the standards process because it will not only risk alienating firms and prevent them from joining in the process, but it will also slow the development of standards.

It is extremely important in ATIS' view, therefore, that the Commission make it expressly and unambiguously clear that the *N-Data* Decision should not be interpreted to create a *per se* rule for liability where a patent owner provides a licensing assurance that sets forth specific licensing terms and then changes those terms as circumstances evolve or time passes. A number of legitimate reasons exist that would justify and support such a change, and a *per se* rule would cause an imbalance among the varied interests of standards development participants. This would be particularly problematic where, as is the case with ATIS' current IPR policy, the SDO's policy does not require that licensing assurances be irrevocable. In such a situation, exposing standards participants to potential legal claims based upon broad concepts

of fairness, and resulting from a good faith compliance with an SDO's policy, would create a mine field of problems that would be antithetical to effective standards development.²

Finally, ATIS wishes to point out that its comments here are based upon approximately 25 years of experience in which standards have been developed under its auspices and under its IPR policy, which has remained essentially unchanged. During this time we believe an effective balance of all interests has been achieved. As stated above, therefore, while the FTC certainly has an important role in addressing egregious behavior, SDOs such as ATIS can and should be allowed to continue to adopt rules and policies relating to IPR with relative freedom.

ATIS appreciates the opportunity to provide these comments and for the Commission to consider them in its further deliberations in the *N-Data* matter.

Respectfully,

Alliance for Telecommunications
Industry Solutions

Thomas Goode
General Counsel

² As the Federal Circuit has recognized, imposing obligations on participating firms based on undefined and ambiguous rules, particularly if applied after-the-fact, will have the same negative consequences of chilling standards development as deceptive conduct in violation of a well-defined policy. *See Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1102 n. 10 (“[j]ust as a lack of compliance with a well-defined patent policy would chill participation in open standards-setting bodies, after-the-fact morphing of a vague, loosely defined policy to capture actions not within the actual scope of that policy likewise would chill participation in open standard-setting bodies”).